IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 400 of 1998

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

---

1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

BHUPENDRA STEEL

Versus

KRISHNA EXPORT

Appearance:

Mr. K.S. Nanavati, Sr. Advocate with
Mr. Vimal Patel for the appellant

Mr. B.J. Shelat, with
Mr. D.C. DAVE for Respondent No. 1

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision:16/09/1998

C.A.V. JUDGMENT

#. This appeal from order is directed against the order dated 11th August, 1998 passed by the learned Chamber Judge, Court No.18, City Civil Court,Ahmedabad, below Exh.5 (notice of motion) in Civil Suit No.3266 of 1998 whereunder the ad-interim relief granted by the trial court earlier has been vacated.

#. The learned counsel for the partied do not dispute that the application Exh.5 was filed under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code). So this appeal is under section 104 read with Order 43 Rule 1 (r) of the Code.

#. Grant of interim injunction under Order 39 Rule 1 of the Code is discretionary and equitable relief, though the discretion is to be exercised judiciously. An appeal against discretionary order or order of equitable relief under section 104 read with Order 41 Rule 1(r) of the Code is an appeal against interlocutory discretionary order, and an order passed in equitable jurisdiction, and the powers of the appellate court in such appeal are not as wide as are of the appellate court in a regular appeal against decree. Appellate Court hearing appeal under section 104 read with Order 41 Rule 1(r) of the Code will interfere with discretionary order by the court of first instance, and substitute its own discretion except where the discretion has shown to have been exercised arbitrarily or capriciously or perversely or where the court has ignored the settled principles of law regarding grant or refusal of interlocutory injunctions. So an appeal against a discretionary order can conveniently be said to be an appeal on principle. In such case the appellate court will not reassess the material and reach to a conclusion different from the one reached by the learned trial court solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in judicious manner, the fact that this court as appellate court would have taken a different view may not justify interference with the trial court exercising discretion.

#. The learned counsel for the parties have addressed in this appeal their contentions as if this court is sitting on original side. I frankly concede that this court has also granted some latitude to the learned advocates for the parties, to a certain extent, to address the matter as if it is the original court. But the learned advocates have not taken that much of liberty and have

not misused the liberty granted by this court. It deserves appreciation by the court that both the learned counsel for the parties, despite having been given this latitude by the court, were very precise, to the point and brief in making their submissions.

#. As this is an appeal under section 104 read with Order 43 Rule 1(r) of the Code and looking to the fact that this Court has a very limited jurisdiction to interfere with the discretionary order passed by the trial court, and in the facts and circumstances of the present case, this appeal itself lies only on the principle, and I do not consider it necessary to set forth in this order the facts of the case in detail. The facts of the case are given in detail in the impugned order by the learned trial court, and that is another reason which persuaded me not to give out in extenso the facts of the case. However, I could not refrain from observing at this stage one important aspect. The pleadings of this appeal have been made by the learned counsel for the parties voluminous more than what it was necessary. The record has been made voluminous in two ways. Firstly, by making bulky pleadings in the form of memo of appeal, civil applications, reply affidavit, counter affidavit, etc., and secondly, by producing additional documentary evidence in the appeal. Learned counsel for the plaintiff-appellant filed civil applications No. 7469 of 1998 and 8334 of 1998 purporting to be under Order 41 Rule 27 of the Code. By these applications prayer has been made by the plaintiff-appellant to permit him to produce additional evidence as detailed therein. I will deal with these applications at the appropriate place in this order.

#. Howsoever brief I may be in this order in narration of the facts of the case few facts of the case are to be taken out from the record for the purpose of appreciating the controversies raised by the learned counsel for the parties in the appeal. One Tawakuli Trading Co., L.L.C.,of Dubai (U.A.E.) (hereinafter referred to as "the importer") was desirous of purchasing the programmed floppies (hereinafter referred to as "the said goods"). It is the case of the plaintiff-appellant that for import of these goods, the importer contacted one Jagdish D. Trivedi, brother of the plaintiff, who is permanently residing in Dubai. Through his brother Jagdish D. Trivedi, plaintiff contacted defendant No.1 respondent No.1 herein and negotiated for purchase of the said goods. In pursuance of the negotiations which took place between the plaintiff-appellant and the importer through the mediation of Jagdish D. Trivedi, the importer placed

firm order for purchase of the said goods upon the plaintiff-appellant. The plaintiff-appellant did not possess the requisite exporter-importer code (licence). It was necessary for him to route the transaction through a person or entity holding requisite exporter-importer licence for the purpose. Defendant No.1 -respondent No.1 had agreed to export the said goods to the importer on the basis of his exporter-importer code (licence). The total value of the goods was U.S.$ 2,85,714-50 . (equivalent to Indian Rs.1,21,42,866.25 ps. approximately). The plaintiff-appellant had agreed to pay 1% of the value of the order to defendant-respondent No.1. That agreement was negotiated and finalised between the plaintiff-appellant and defendant No.1-respondent No.1 at Ahmedabad. As per the said agreement which in the form of letter dated 27th March, 1998, defendant No.1-respondent No.1 was also liable to execute a power of attorney in favour of the plaintiff -appellant to enable him to withdraw the amount from his account maintained with defendant No.2 Bank. Defendant No.1-respondent No.1 exported the said goods to the importer, and the importer did open letter of credit in his favour, and the amount of U.S.$ 2,85,714.50 was to be credited in account No.616 of defendant No.1-respondent No.1 with defendant No.2. The plaintiff-appellant has come up with further case that despite repeated requests made to defendant No.1-respondent No.1 he has not executed the power of attorney in his favour to enable him to withdraw the said amount from the Bank as per the agreement reached. The grievance made by the plaintiff-appellant is that after completion of the export, defendant No. 1- respondent No.1 has developed evil intentions and as a result thereof he has not executed the power of attorney. The plaintiff -appellant filed civil suit No.3266 of 1998 in the City Civil Court at Ahmedabad, and prayed for grant of the following reliefs:

"(a) to declare that the plaintiff is legally entitled to receive Rs.1,21,42,866.25 (equivalent to US $ 2,85,714.50) from account No.616 of defendant No.1 maintained with defendant No.2.

(b) to grant mandatory order / injunction permitting the plaintiff to withdraw Rs.1,21,42,866.25 ps. (equivalent to US $ 2,85,714.50) from account No.616of defendant No.1 with defendant No.2; in the alternative to pass order directing defendant No.2 to pay to the plaintiff the sum of Rs.1,21,42,866.25 (equivalent to US $ 2,85,714.50 from out of the

defendant No.1's account No.616).

(c) to grant permanent injunction restraining defendant No.1 from withdrawing Rs.1,21,42,866.25 (equivalent to U.S. $ 2,85,714.50) or any part thereof from Account No.616 with defendant No.2 and be further pleased to restrain defendant No.2 from making payment to defendant No.1.

(d) to grant such other and further reliefs as deemed fit and proper in the circumstances.

(e) to award cost of the suit to the plaintiff from defendant No.1."

Along with the civil suit the plaintiff filed application Exh.5 under Order 39 Rules 1 and 2 of the Code for grant of interim injunction. The prayer made in this application are as under:

"9(a) Pending hearing and final disposal of the suit, be pleased to grant mandatory order / injunction permitting the plaintiff to withdraw Rs.1,21,42,866.25 (equivalent to US $ 2,85,714.50) from account No.616 of defendant No.1 with defendant No.2; in the alternative, to pass order directing defendant No.2 to pay to the plaintiff the sum ofRs.1,21,42,866.25 (equivalent to US $ 2,85,714.50 from out of the defendant No.1's Account No.616.

(b) Pending hearing and final disposal of the suit, be pleased to grant temporary injunction restraining defendant No.1 from withdrawing Rs.1,21,42,866.25 (equivalent to US $ 2,85,714.50) or any part thereof from Account No.616 with defendant No.2 and be further pleased to restrain defendant No.2 from making payment to defendant No.1."

The trial court granted ex parte ad interim relief on 6-7-1998 in terms of para 9(b). In reply to the notice of motion defendant No.1 -respondent No.1 put appearance and contested the application on merits. Briefly stated, the defences taken by him are as follows:

(i) Plaintiff is brother in law of one Kamlesh K. Thakkar who is known to defendant No.1-respondent No.1.

(ii) Kamlesh K. Thakker is doing the business of steel, and the plaintiff to his belief is in the employment of said Kamlesh K. Thakkar in his firm M/s. Kannailal Mohanlal.

(iii) Defendant No.1- respondent No.1 does not know Jagdish D. Trivedi.

(iv) Said Kamlesh K. Thakkar is dealing in the business of merchant export. He passed on to defendant No.1 -respondent No.1 information to the effect that the importer at Dubai was interested in procuring from India software packages for accounting purposes from a party who can effectively deliver the same to the importer at Dubai. However, it is not in the knowledge of defendant No.1-respondent No.1 as to how said Kamlesh came to know about the said information of requirement of goods by the importer at Dubai.

(v) The importer placed order for export of goods with defendant No.1. Defendant No.1 forwarded export proforma invoice dated7-3-1998 inter alia stipulating therein terms and conditions, subject to which he would like to export the kind of his software packages desired by the importer. In the proforma invoice neither the name of the plaintiff-appellant nor Kamlesh Thakkar Trivedi figured as agent, which otherwise should have figured as per the practice prevalent in the trade, in case the case of the plaintiff appellant would have been correct.

(vi) The export proforma invoice of defendant No.1 has been accepted by the importer and as a result thereof as per the practice prevalent in the trade, letter of credit dated 2nd April, 1998 came to be opened at the behest of the importer in favour of defendant No.1 as the beneficiary therein.

(vii) The kind of software package to be exported was got developed by defendant No.1 through one Flyfot Software Developer of Vallabh-Vidyanagar; and till now Rs.20 lacs have been paid to the said concern for this work, and huge sum remains to be paid by defendant No.1 to said Flyfot Software Developer.

(viii) The goods were exported to the importer which was subsequently followed by letter dated

26th May, 1998 to defendant No.2 with request to give credit of the amount referred to therein in his account in furtherance of the letter of credit referred therein .

(ix) That the entire transaction of export undertaken by defendant No.1-respondent No.1 was duly completed . He denied any sort of agreement and particularly the agreement as pleaded by the plaintiff-appellant.

#. Defendant No.1-respondent No.1 has come up with the case that the agreement is a forged document. It is further case of the defendant-respondent No.1 that the expenditure which was required to be incurred for the purpose of paving way for smooth export of the software packages were entirely and solely made by him. The requisite formalities which were required to be undertaken for the purpose of export were also solely and exclusively shouldered by defendant-respondent No.1. The pleadings were further supplemented by the parties. In the further pleadings defendant - respondent No.1 has come up with the case that the letter dated 24thMarch, 1998 of Tawakuli Trading Co.L.L.C. is also a forged document.

#. After considering the pleadings of the parties and the documents produced in support thereof , and after hearing the learned counsel for the parties, under the impugned order the trial court vacated the ad interim relief granted earlier and the notice of motion was ordered to stand disposed of. Hence this appeal before this court.

#. With this appeal there are three civil applications filed by the plaintiff-appellant, details of which are as under:

Civil Application No.7461 of 1998: In this civil application prayer has been made for grant of interim injunction in terms para 4 (B) and (C) thereof.

Civil Application No.7469 of 1998: By this civil application under Order 41 Rule 2 of the Code prayer has been made for permitting the appellant-plaintiff to produce additional evidence, details of which are as under:

(i) General power of attorney dated 10-12-1997 executed by Krishna Exports (defendant No.1-respondent No.1).

(ii) Letters of Krishna Exports showing identical letter heads.

(iii) Letters of transaction in question which show that defendant No.1-respondent No.1 was aware of Shyam Sunder Mehra.

Civil Application No.8384 of 1998: By this civil application prayer has been made for producing further documentary evidence, details of which are as under:

(i) Copy of affidavit dated 20thAugust, 1998 of Tawakuli Trading that contract was negotiated by the Company only with Bhupendra Steel and not with Krishna Exports.

(ii) Reports dated 27-8-1998 of hand writing export.

(iii) Quotation dated 24-8-1998 of Ravi Enterprise for supply of super power software packages.

##. First of all I consider it proper to deal with the two civil applications filed by the plaintiff-appellant for granting permission to him for producing the documents referred therein as additional evidence in this appeal. Initially both the learned counsel for the parties made detailed submissions on these civil applications. But in later point of time learned counsel for defendant No.1 respondent No.1 gave up the challenge to these applications and conceded that these documents may be considered at this stage to avoid any further delay in the matter.

##. It has further been contended that he is conceding for taking these documents on record for the consideration of the Court, persuaded by the reasons first, that in the suit the issues have not been framed so far; and secondly any delay in disposal of these proceedings of interlocutory nature results in recurring loss of Rs.10,000/- per day by way of interest to the defendant No.1. Learned counsel for the appellant submitted on this last point that the loss may not be more than Rs.6,000/- per month because of the pendency of these proceedings before this court.

##. In this appeal it is true that this court has not granted any interim relief in favour of the plaintiff-appellant. But the learned counsel for

defendant No.1-respondent No.1 has put appearance on caveat and given out the understanding that till this matter is decided his client will not withdraw the amount of the letter of credit which has been credited in his account No.616 with respondent No.2 bank. This understanding given by the learned counsel for respondent No.1 is as good as grant of interim relief by this court. Be that as it may. In view of this concession made by the learned counsel for the defendant- respondent No.1 it is not necessary for this court to go on merits of these two civil applications.

##. On merits of the appeal learned counsel for the appellant contended that the document dated 27th March, 1998 is not a forged document. This document is an agreement between the parties and learned trial court should have given effect to the same. This document does not contravene any of the provisions of the Foreign Trade (Development and Regulation) Act,1992 (hereinafter referred to as the Act, 1992). Such memorandum of understanding or agreement is not hit by the provisions of section 23 of the Contract Act also. Learned trial court has not correctly appreciated the aforesaid regulation and has fallen in error in holding that the ostensible legality of the document would not help the plaintiff for the simple reason that the agreement in question is prima facie to circumvent the provisions of law. It has next been contended that the learned trial court, though held that this document / agreement dated 27th March, 1998 is not illegal ex facie, but still it declined relief to the appellant -plaintiff by holding that upholding of such type of contract would tantamount to encourage persons to circumvent the provisions of statute, which otherwise explicitly forbids export without licence. Lastly it is contended that the document / agreement was not held to be forged document even prima facie, and the learned trial court in that view of the matter and in the fact of the case ought to have considered that decline of interim relief will result in causing irreparable injury to the plaintiff-appellant, and further that the balance of convenience also favours grant of interim relief. Voluminous documentary evidence produced by the plaintiff-appellant to prove that it was genuine agreement and defendant respondent No.1 has voluntarily executed the same as he was benefitted by the said agreement was not considered in correct perspective. Moreover, now whatever suspicion or doubt about genuineness of this document even ever exists no more remains as the handwriting expert's opinion is there on the record where he opined that the signature of

defendant -respondent No.1 is there on this document.

##. On the other hand the learned counsel for defendant-respondent No.1 contended that it is a case of fraud which has been committed by the plaintiff-appellant at all stages i.e. before and post filing of the suit. The agreement dated 27th March,1998 is a forged document. Not only this, the letter of the importer dated 24th March,1998 is also a forged document. To prove this document to be genuine the plaintiff-appellant has procured many other documents and it is now clearly borne out that some body sitting at Dubai is the person interested and this suit has been filed at the instance of that person by the plaintiff-appellant. Learned counsel for the respondent No.1 has illustrated many of the suspicious circumstances surrounding the document dated 27th March, 1998 and the letter of the importer dated 24th March, 1998. It has next been contended that in the matter of grant of temporary injunction it the discretion of the court and if we go by this agreement and it is strictly considered, then the trial court has not committed any error whatsoever in holding it to be an agreement to frustrate the provisions of the Act, 1992. The very fact that out of the total amount of letter of credit, i.e. U.S.$ 2,85,714.50 , amount of costs of the bill of export, 99% thereof has to be shared by the plaintiff-appellant is nothing but a clear case where he, though not having any licence for export or import, stood in the position of exporter and the person who is an exporter - importer licence holder has to stand in the position only of getting 1 per cent commission. It is totally a reversal order, if this agreement is accepted i.e . the real exporter will only be a commission agent and the person who has procured the order, what at the best the case of the plaintiff is, will be exporter. This is clearly a trick played by the plaintiff to make the provisions of the Act, 1992 nugatory.

##. Carrying this contention further learned counsel for the defendant-respondent No.1 submitted that otherwise also the conduct of the plaintiff-appellant deserves to be taken note of and only on this conduct as he illustrated, the decline of injunction by the trial court cannot be said to be illegal or arbitrary. During the course of arguments in the trial court, learned counsel for the plaintiff -appellant has given out that all the expenses of the export of goods were borne by the defendant-respondent No.1, and the plaintiff-appellant is entitled to 99% of the reminder of the amount of letter of credit after excluding the expenses incurred by defendant-respondent No.1 for exporting of the goods.

Necessary amendment in the plaint and the application Exh.5 has not been made and insistence still is of 99% of the total amount of letter of credit. From this fact it is clear that the plaintiff-appellant has not come up with clean hand before the Courts. To supplement this contention, learned counsel for the defendant-respondent No.1 urged that otherwise also this alleged agreement on the face of it is unreasonable and even if this agreement is taken to be a genuine agreement for the sake of argument it is not obligatory on the part of the court to still insist for execution thereof by defendant -respondent No.1. It is difficult to understand, even if such type of business is legal to share the profit by the agent to the extent of 99%. Lastly, learned counsel for the defendant-respondent No.1 submitted that it is not a fit case where interim injunction deserves to be granted in favour of the plaintiff-appellant, as declining of the same will not cause any injury, much less irreparable injury, which cannot be compensated in terms of money if ultimately he succeeds in the suit. Balance of convenience in the given facts of the case also favours for declining the injunction.

##. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

##. If we go by the prayer made by the plaintiff-appellant in the application Exh.5, I find that one of the prayer is that the defendant - respondent No.2, namely, Bank of Baroda (Main) Branch, Anand, be restrained from making payment to defendant-respondent No.1 of amount of Rs.1,21,42,866. 25 ps. (equivalent to US $ 2,85,714.50), the amount which has been credited in account No.616 of defendant -respondent No.1 in pursuance of the letter of credit issued by the importer wherein he has been shown as the beneficiary thereof. The parties are not at variance that in pursuance of the letter of credit, wherein defendant respondent No.1 is the beneficiary, the aforesaid amount has been credited in his account. The importer has not filed any suit against the defendants-respondents.

##. It is a different matter that behind the curtain the importer is supporting the plaintiff- appellant. But it is equally true that the importer has not disputed this export transactions and letter of credit in favour of defendant - respondent No.1. At the cost of repetition it is to be stated that the importer is no way and manner praying for injunction against the Bank of Baroda, (Main) Branch, Anand to restrain it from making payment of the amount of letter of credit which is credited in the

account of defendant -respondent No.1 to him. It is the case where the plaintiff-appellant who has nothing to do with this transaction of export is praying for order against the bank not to pay the amount of letter of credit credited in the account of defendant -respondent No.1 to him. Now the question which falls for consideration of this court is whether such injunction as prayed for in the application Exh.5 by the plaintiff-appellant can be granted, restraining the Bank of Baroda, (Main) Branch, Anand, from making payment of the amount of letter of credit credited in the account of defendant - respondent No.1 to him. Second question which falls for consideration is whether the defendant Bank can be directed to pay to plaintiff-appellant the sum of Rs.1,21,42,866-25ps (equivalent to U.S. $ 2,85,714-50) out of the defendant-respondent No.1's A/c. No.616 ? The courts shall refrain from granting injunction to the extent of performance of contractual obligations arising out of a letter of credit between one bank and another. If such type of injunctions were to be granted, in a transaction between two banks, the whole banking system in the country will fail. Where in the course of commercial dealings any conditional letter of credit is given or accepted, the beneficiary is entitled to realise such letter of credit in terms thereof. The Bank giving such letter of credit is bound to honour it irrespective of any dispute raised by a customer. The very purpose of giving such a letter of credit or a bank guarantee would otherwise be defeated and therefore the court should be very slow in granting any temporary injunction to restrain realisation of such letter of credit or bank guarantee. Existence of any dispute between the parties to a contract is not a ground for issuing injunction restraining the enforcement of the letter of credit or bank guarantee. The judicial precedence carve out only two exceptions to this general rule of prudence and caution. A fraud in connection with such a bank guarantee or letter of credit would affect the very foundation of such bank guarantee or letter of credit. So if there such a fraud of which the beneficiary seeks to take advantage, certainly it may be a case where he can be restrained by the court from doing so by grant of temporary injunction. The second exception relates to cases where allowing encashment of an unconditional letter of credit or bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. These two grounds are not necessarily connected. However, in some cases both may co-exist. This principle is laid down by the apex court in catena of decisions, and reference in this respect may have to the latest decision of the apex court in the case of U.P.

State Sugar Corporation vs. Sumac International Ltd., reported in 1997 (1) SCC 568. The case in hand does not fall in the category of cases where the injunction could have been issued by the courts, restraining the bank from making payment to the beneficiaries of the letter of credit. As stated earlier, and again it is to be said at the cost of repetition, that the very first and foremost ingredient for praying for such a relief against the Bank is altogether missing in this case. The plaintiff-appellant is not a contracting party to the letter of credit, and secondly the letter of credit is not in his favour. This prayer in a proper case is understandable coming from the bank or customer, but not by a person who is altogether stranger to the contract. At the most what the plaintiff-appellant has stated is accepted to be correct, his position is only of an agent, and / or a commission agent for procuring export order. In a case where an agent or commission agent is not paid his commission from the profits of the export order procured by him for the exporter, he is not within his competence to file a suit praying for injunction restraining the concerned bank from permitting withdrawal of the amount of letter of credit by the exporter who is the beneficiary therein. Even in a case where the agreement of agency or commission agent is accepted to be true and genuine, still the prayer of the nature as sought by the plaintiff-appellant against defendant respondent No.1 could not have been granted by the court. Leaving apart the fact that this first ingredient is altogether missing from this case, further it is not the case of the plaintiff-appellant that the letter of credit is a forged document or, secondly, that in case the temporary injunction is not granted he will suffer irretrievable loss in the matter. So the prayer made in the interim injunction application Exh.5 for restraining defendant- respondent No.2 -Bank from making payment of the amount of letter of credit credited in the account of defendant -respondent No.1 to him is wholly misconceived, ill-advised and unwarranted. This prayer made by the plaintiff-appellant deserves no acceptance.

##. Now I may consider the second question which falls for consideration of this Court. Interim relief of the nature as prayed for against the Bank to direct it to pay to the plaintiff-appellant a sum of Rs.1,21,42,866=25 from the account of the defendant-respondent No.1 also cannot be granted. The prayer made amounts to an attempt to get indirectly what otherwise is not permissible to the plaintiff-appellant directly. This prayer is directly against the Bank and I fail to see how the Bank can be compelled by this Court to permit the withdrawal

of the amount from the account of a customer. The Bank has no such brevity of contract, particularly, a tripartite contract agreement amongst the Bank, defendant-respondent No.1 and the plaintiff-appellant whereunder the defendant-respondent No.1 has agreed upon the withdrawal of the amount from his account by the plaintiff-appellant. It is also not the case of the plaintiff-appellant that any such power or authorisation has been given or conferred upon him by defendant-respondentNo.1 to him by the plaintiff-appellant. Grant of such a prayer will otherwise result in worse than what is even not permissible in a case where the Bank or the customers praying in the Court for grant of injunction against the withdrawal of amount of letter of credit or encashment of Bank Guarantee. It is not gainsaid to state here that this amount withdrawal of which is sought for by way of temporary injunction by the plaintiff-appellant is the amount which has been credited in the account of defendant-respondent No.1 in pursuance and under the letter of credit. The letter of credit is a forged document or it will cause any irretrievable injury to the Bank itself or to the importer is also not the case of the plaintiff-appellant. Not only this, grant of such a prayer and issuance of temporary injunction of the nature as prayed for will amount to decreeing the suit itself which otherwise the Court ordinarily should not order at this stage.

##. Before dealing with the matter of grant of temporary injunction against the defendant-respondent No.1, as prayed by the plaintiff-appellant, I consider it to be appropriate to briefly state what are the necessary ingredients which are to be established to the satisfaction of the Court by the party concerned, before exercising its extra ordinary, discretionary and equitable remedy of grant of interlocutory injunction.

##. Usually, the prayer for grant of interlocutory injunction is at a stage when existence of legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The Court at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. Not only it is an equitable remedy, this remedy intends to preserve in status-quo the rights of the parties which may appear on a prima-facie case.

##. A party is not entitled to an order of temporary or interlocutory injunction as a matter or right or course. The grant of temporary or interlocutory injunction is within the discretion of the Court which is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. Thus, the purpose of temporary injunction is to maintain the status-quo. Court grants such relief according to the legal principles -- ex-debito justitiae. Before any such order is passed, the Court must be satisfied that a strong prima-facie case has been made out by the plaintiff and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him. The Courts should always be willing to extent its hands to protect a citizen who is being wrongfully deprived of his property without any authority in law or without following the procedure which are fundamental and vital in nature, but at the same time, judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court. This power of the Court to grant injunction is an extraordinary power vested in it to be exercised taking into consideration the facts and circumstances of a particular case. (See: Shivkumar Chaddha v. Municipal Corporation of Delhi - 1993(3) SCC 161).

##. Reference to another decision in the case of Gujarat Bottling Co. Ltd. & Ors. v Coca-Cola Co. & Ors., reported in 1995(5) SCC 545 may have where the Apex Court has observed; grant of interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion, the Court applies the following tests: (i) whether the plaintiff has a prima-facie case, (ii) whether the balance of convenience is in favour of the plaintiff and (iii) whether the plaintiff would suffer an irreparably injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established at the trial on evidence. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved.

##. From the case law, the principles which are to be

followed by the Courts while dealing with the application filed by the plaintiff for grant of temporary injunction are that the grant of temporary injunction is a discretionary power in equity jurisdiction of the Court. Being a relief in equity, it is based on equitable principles. Interim relief can only be granted where the plaintiff has proved to the satisfaction of the Court that he has a strong prima-facie case in his favour. The balance of convenience favours for grant of injunction in his favour and the decline of grant of relief will cause to him irreparable injury which cannot be compensated in terms of money. Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches to the Court. Apart from other considerations, the Court has to look to the conduct of the party invoking the jurisdiction of the Court and may refuse to interfere unless his conduct was free from blame.

##. In the present case, the plaintiff-appellant has come up with the case that the importer placed the order for the export of the goods to him and by producing the documentary evidence before the trial Court as well as the additional evidence before this Court, he has tried to show that he was the person who has to export these goods to the importer. By filing the affidavit of Tawakuli Trading Co. L.L.C., it is emphasized that the export-import order by the said importer has been confirmed by it in favour of the plaintiff-appellant vide its letter dated 24th March 1998. I consider it to be appropriate to reproduce the averments of the affidavit of Tawakuli Trading Co. L.L.C., as contained in para-3 thereof.

> 3. I state that the aforesaid contract for import of software was negotiated by our Company through Jagdish Dhanuprasad Trivedi, with his brother Bhupendra Dhanuprasad Trivedi, the proprietor of Bhupendra Steel. I am informed as per the said letter dated 19/08/1998 faxed to me by Bhupendra Trivedi that one Subhash H. Patel of Krishna Exports has filed an affidavit stating that aforesaid contract was placed by us and negotiated directly with Krishna Exports. I may clarify that if so is the case, no such contract was entered into or negotiated by our Company with Krishna Exports whom we do not directly nor have we met any representative of Krishna Exports or Subhash Patel til date. I reiterate that the aforesaid contract was negotiated by our Company only with Bhupendra Steel, but since Bhupendra

> Steel had informed regarding the problem of Import-Export code certificate, our Company had requested for faxing the proforma invoice in any other firm name.

The services of the defendant-respondent No.1 were taken, as per the plaintiff-appellant's case, only for the reason that he was having importer - exporter code number and in lieu thereof, out of total amount of letter of credit to be credited in his account, 99% thereof was to be taken by the plaintiff-appellant and accordingly an agreement is alleged to have been executed by the defendant-respondent No.1 in favour of the plaintiff-appellant. It is not the case of the plaintiff-appellant that he acted as an agent or mediator in this export transactions. The Parliament, to provide for the development and regulation of foreign trade by facilitating imports into an augmenting exports from India and for matters connected therewith or incidental thereto, enacted the Act, 1992. Section 7 of this Act prohibits any import or export except under an importer exporter code number, granted by Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this behalf by the Director General. Section 11 of this Act lays down that no exports or imports shall be made by any person, except in accordance with the provisions of this Act, rules or orders made thereunder and the Export and Import Policy for the time being in force and contravention thereof by any person is punishable under the said Section of the Act. Though the agreement dated 27th March 1998 which is alleged to be executed by the defendant-respondent No.1 in favour of the plaintiff-appellant is a disputed document, and more so as per the case of defendant-respondent No.1, it is a forged document, but the plaintiff-appellant has admitted this document and if we go by this document, then also it is apparent that the plaintiff-appellant has, in substance, projected him as an exporter and the defendant-respondent No.1 only a person whose exporter importer code number has been used. The learned trial Court, in the facts of this case, has not committed any error or illegality in holding that it is a clear case where in case the interim injunction is granted, then the Court will uphold such contracts which would tantamount to encouraging the businessmen and traders to circumvent the provisions of statute which otherwise explicitly prohibits export without licence.

##. In the case of Shivkumar Chaddha v. Municipal Corporation of Delhi (supra), their Lordships of Hon'ble

Supreme Court observed that judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court. The plaintiff-appellant, if we go by his case, in fact and substance, seeks from this Court protection of his illegal activities of exporting of goods to the importer though he is not having exporter-importer code number. In case such injunction, as prayed for, leaving apart the question whether the agreement dated 27th March 1998, is forged document or not, is granted in favour of the plaintiff-appellant, then it will tantamount to perpetuating a wrong committed by a person who approaches the Court for exercise of its discretionary powers in the equitable jurisdiction. Exercising of discretionary powers in the equitable jurisdiction in such matter by the Court will otherwise encourage the people to act contrary to what the mandate of the statute contemplates. The role of the Courts is to see that citizens of the country do their business and trading as per, what the law of the country provides, permits, regulates and authorises. This Court will not pass an order which gives affirmance to the activities of commercial trading or business, to the parties who approach to this Court, which if undertaken, are contrary to and under clear prohibition under the statute.

##. Apart from this, as held by their Lordships of Supreme Court, in the case of Gujarat Bottling Co. Ltd. & Ors. v. Coca-Cola Co. & Ors. (supra), the Court, apart from other considerations, also may look into the conduct of the parties invoking the jurisdiction of the Court and may refuse to interfere unless the conduct is free from blame. The relief, by grant of interim relief, is wholly equitable in nature and the plaintiff-appellant who is invoking this jurisdiction of this Court has to show that he has come up before the Court with clean hands or that he was not unfair. In the case in hand, the conduct of the petitioner is not free from blame. He has made an attempt to overreach the provisions of the Act, 1992, and not only that, he has made an attempt to take the benefits of his aforesaid trading activities. So on the basis of this conduct otherwise also, the plaintiff-appellant is not entitled for any grant of interlocutory injunction in his favour by the Court. In the case of Gujarat Bottling Co. Ltd. & Ors. v. Coca-Cola Co. & Ors. (supra), their Lordships of Supreme Court, have observed that while considering the case of grant of interim injunction as prayed for by the party approaching to the Court, it has to consider that the party concerned was not unfair or inequitable in his dealing with the party against whom he was seeking

relief. In this case, it is established on the record that the plaintiff-appellant is not fair and equitable in his dealing with the defendant-respondent No.1, leaving apart the question whether the document, agreement dated 28thMarc 19098, is forged or not. The total cost of goods exported by defendant-respondent No.1 to the importer was of U.S. $ 2,85,714=50, equivalent to Indian Rs.1,21,42,866=25 and it is admitted case of the plaintiff-appellant that he has not incurred a single pie towards the expenses of exports of the goods to the importer. The learned counsel for the appellant, on being asked by the Court, admitted that not a single pie of the plaintiff-appellant is at stake in exporting of these goods. As per the agreement dated 27th March 1998, 99% of this amount was to be taken by the plaintiff-appellant. Leaving apart whether such a percentage of share of profit is reasonable or not, in case this prayer made by the plaintiff-appellant is granted, then it will result in a loss to the defendant-respondent No.1. One percent of this amount is about Rs.1,21,000/= and the cost of fulfilling of the order of export as put by the importer is much more than this amount and the net result of grant of this interim relief as prayed for by the plaintiff-appellant would have resulted in loss of lacs of rupees to the defendant-respondent No.1. However, I am not deciding in this appeal nor I can decide what actual cost incurred by the defendant-respondent No.1 for exporting the goods to the importer. This is a matter of trial in the suit. The unfairness on the part of the plaintiff-appellant towards the defendant-respondent No.1 against whom he is seeking interim relief is clearly borne out from the fact that he has come up with this case initially that out of this amount of letters of credit, he is entitled for 99% thereof. It is true that later on he has changed this stand and started to claim 99% of the profits coming from this export order. That is again a disputed question of fact what should have been the profit out of this export order and I am not called upon to decide the same and it is also not the stage to decide the same. So the plaintiff-appellant is most unfair and inequitable in dealing with the defendant-respondent No.1. This is another ground on which, I do not find it to be a fit case where temporary injunction could have been granted by this Court in favour of the plaintiff-appellant.

##. The learned trial Court, though very specifically has not held the document - Agreement dated 27th March 1998 and the letters on record dated 29th March 1998 are forged documents but from the facts which have come on the record and from the arguments advanced by the learned

counsel for the defendant-respondent No.1, prima-facie, I am satisfied that these two documents are surrounded by suspicious circumstances which have not been dispelled by the plaintiff-appellant. The learned counsel for the defendant-respondent No.1 has illustrated in many ways, how these two documents are forged on the face of it, but it is not the stage where a final adjudication on this point has to be made and to be decided finally. This is a very serious question of fact which has to be gone into by the trial Court in the suit but it cannot be said that this defence taken by the defendant-respondent No.1 is altogether of no substance.

##. The learned counsel for the plaintiff-appellant has tried to impress upon or to persuade the Court that the expert opinion has been taken by the plaintiff-appellant and it has been produced on the record of this Appeal and this document-agrement dated 27th March 1998, should be taken to be genuine document. It is true that the expert evidence is there but it is equally true that this expert opinion has been taken by none other than a party who wants to take the benefit under this document. It has been taken only after the trial Court declined to grant temporary or interlocutory injunction in favour of the plaintiff-appellant. I do not mean to say here that this expert opinion may not be correct or it cannot be taken into consideration, but what I am of opinion is that it is not the proper stage where this one sided expert opinion which is not subject to the test of cross-examination from the other side, should be taken as conclusive evidence of genuineness of the document-agreement dated 27th March 1998. There is yet another reason not to take this expert opinion to be conclusive evidence at this stage or an evidence for the purpose of prima-facie accepting what the learned counsel for the appellant contended, as the surrounding suspicious circumstances to this document and the letter dated 24th March 1998 of the importer are not being stood dispelled by this expert opinion. While dealing with the application for grant of temporary injunction, ordinarily, the Court should have refrained itself to go deep on the merits of the mater but whether any prima-facie case is there or not in favour of the plaintiff-appellant's side, the Court has to go on these questions only for this limited purpose. Whatever observations are made on merits of the matter are only tentative and not final. The matter has to be decided by the trial Court finally only after both the parties produce their evidence. Taking into consideration the totality of the facts of this case, I am satisfied that the plaintiff-appellant otherwise has no prima-facie case

in his favour.

##. This question of prima-facie case may also be examined from another aspect. If we go by the broad spectrum of facts on which there is no dispute, the export invoice has been sent by the defendant-respondent No.1 to the importer and after accepting that export invoice, the firm order had been placed by the importer and in pursuance thereof he has opened a letter of credit as defendant-respondent No.1 beneficiary therein. In the letter of credit also, it is specifically mentioned that the defendant-respondent No.1 is beneficial and this letter of credit has been opened in response to and in pursuance of his export invoice dated 7.3.98. The defendant respondent No.1 has incurred all the expenses for process of software floppies as per the specifications and requirement of importer as well as all other expenses of export of the same to the importer at Dubai. The plaintiff-appellant has admitted that he has not incurred a single pie in the process of of these software floppies, and other expenses of export of these goods to the importer at Dubai. It is also admitted fact that the defendant-respondent No.1 was having the importer-exporter code number as allotted to him by the competent authority under the provisions of the Act, 1992. In the presence of these facts and coupled with the fact that the basis of the suit, the document, alleged agreement dated 27th March 1998 is surrounded by suspicious circumstances, it cannot be considered to be a fit case where prima-facie it can be taken that the plaintiff-appellant has a prima-facie case in his favour which justified this Court to grant temporary injunction as prayed for in the application ex.5.

##. Temporary injunction can be granted by the Court only when the plaintiff-appellant satisfies the Court in addition to prima-facie case in his favour, the balance of convenience also favours for grant of temporary injunction and refusal to grant the temporary injunction will result in causing irreparable injury to him which cannot be compensated in terms of money. Though in view of my findings that the plaintiff-appellant has no prima-facie case in his favour, no temporary injunction deserves to be granted in his favour but still I consider it to be appropriate and proper to examine whether in this case it can be said that the balance of convenience favours for grant of interim relief in favour of the plaintiff-appellant and that declining to grant the same by this Court will result in irreparable injury to him which cannot be compensated in terms of money. As observed by their Lordships of Supreme Court, in the case

of Gujarat Bottling Co. Ltd. & Ors. v. Coca-Cola Co. & Ors. (supra), the object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. However, the Court further observed that the need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies.

##. As stated earlier, the defendant-respondent No.1 is the exporter, he exported goods to the importer and he is the beneficial of letter of credit which has already been credited in his account. So he has a legal right to get this money in comparison to which the plaintiff has been claiming 99% of this amount and now 99% of the profit on the basis of alleged agreement which is a highly disputed document and alleged to be a forged document. In such case, the balance of convenience lies in favour of the defendant-respondent No.1 and it cannot be said to be a fit case where in the given facts which have come on record, the defendant-respondent No.1 should be restrained from withdrawing this amount from his account No.616. Though the suit or application or both have not been amended but as it is further pleading of the plaintiff-appellant and what the learned counsel for the plaintiff-appellant has admitted before this Court, the dispute is of sharing of the profits, i.e. the remainder of the amount of letter of credit after deducting therefrom the expenses incurred by defendant-respondent No.1 for carrying out this export order. There is a serious dispute raised by the learned counsel for the plaintiff-appellant also before this Court on quantum of the amount of expenses incurred by the defendant respondent No.1 for carrying out the export order. . It is a matter of determination in trial what actual expenses incurred by the defendant-respondent No.1 for carrying out the export order and what is the amount of profit. So the amount of profit is also not an ascertained or admitted figure. If the agreement is not fulfilled or carried out or honoured, then in such case, when the agreement is proved, the Court can certainly compensate for the damages suffered by the plaintiff-appellant. It is a case of money dealing and if ultimately the trial Court on full fledged trial finds this agreement to be genuine, legal and enforceable, the

Court will pass a decree of the amount found payable to the plaintiff-appellant thereunder together with reasonable rate of interest. In view of these facts, and the legal position, it cannot be said that declining of interim relief in favour of the plaintiff-appellant will cause to him an irreparable injury which cannot be compensated in terms of money. It is always ascertainable damage by the trial Court in the trial of the suit and the necessary order for the said amount can be passed by the trial Court at the final stage. It is not the case where declining of interim relief will result in irretrievable injury to the plaintiff-appellant also. So in this case, the plaintiff-appellant has no prima-facie case in his favour nor the balance of convenience favours for grant of interim relief in his favour and lastly, declining of interim relief by this Court will not result in causing any irreparable or irretrievable injury which cannot be compensated in terms of money if ultimately he succeeds in the suit.

##. If we go by the prayers which have been made by the plaintiff-appellant in the Plaint and ex.5, the relief prayed in both are substantially same. The final relief prayed in the suit and the relief of interim injunction prayed for in the application ex.5 are substantially same and in case this interim injunction as prayed for is granted in favour of the plaintiff-appellant, it will certainly amount to granting of final relief to him without there being any adjudication of the serious disputed questions of facts arise in matter. This relief by way of interim relief, as prayed for, is granted, then what this Court will do at this interlocutory stage to hold that the documents - agreement dated 27th March 1998 and letter of exporter dated 24.3.98 are not forged and agreement is legally enforceable. Their Lordships of Supreme Court, have time and again given a note of caution that interim relief of the nature, in substance giving the principal relief sought in the petition should not be granted. Grant of interim order, in substance giving principal relief sought in the petition has been deprecated by the Apex Court. In this respect, reference fruitfully may have to the decision of the Apex Court in the case of Bank of Maharashtra v. Race Shipping & Transport Co. Pvt. Ltd. & Anr., reported in 1995(3) SCC 257. In para 11 and 12, the Apex Court has observed:

> 11. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being

concerned about the balance of convenience, the public interest and a host of other considerations. [See: Asstt. CCE v. Dunlop India Ltd. -- (1985) 1 SCC 260, 265, State of Rajasthan v. Swaika Properties -- (1985) 3 SCC 217, 224]

12. In the instance case since there is serious dispute on facts it cannot even be said that a prima facie case had been made out for grant of an interim order in favour of the respondents which enables them to have the reimbursement of the sum of Rs.95,000 that was debited to their account in view of the encashment o the cheque in question. We are of the view that this was not a case in which the High Court while admitting the writ petition should have passed an interim order giving such a direction. In the circumstances we are unable to uphold the said interim order passed by the High Court.

Reference may have to another decision of the Apex Court in the case of Burn Standard Co. Ltd. v. Dinbandhu Majumdar, reported in 1995(4) SCC 172. Though this matter pertains to service matter, the Apex Court has deprecated in this case also the practice of the Courts to grant interim relief which in result amount to granting the final relief which has to be granted in final stage of litigation.

In the case of State of U.P. & Ors. v. Visheshwar, reported in 1995 Supp. (3) SCC 590, which was also the service matter, the Apex Court held that grant of final relief in the form of interim relief order is not permissible to the Courts.

In the case of Bharat Bhushan Sonaji v. Abdul K. Mohd., reported in 1995 Supp. (2) SCC 593, the Apex Court has stated that interim order passed pending the writ petition having effect of allowing writ petition itself is not proper.

In the case of Shivkumar v. Board of Directors, reported in 1995 Supp. (2) SCC 726, the Apex Court held that grant of relief asked for in the writ petition by way of interim relief order is not proper.

In the case of Commissioner/ Secretary to Government Health & Medical Education Department, Civil Sectt., Jammu v. Dr.Ashok Kumar Kohli, reported in 1995 Supp.

(4) SCC 214, the Apex Court has observed that interim order should not amount to overreach the main relief which ultimately may or may not be passed in the writ petition.

##. In the present case, in case the relief as prayed for is granted by way of interim relief, it will amount to granting of final relief as prayed for in the suit, at the interlocutory stage. The learned counsel for the defendant-respondent No.1 submitted that this Court may pass the order directing the plaintiff-appellant to make good, the loss which the defendant-respondent No.1 has suffered because of the grant of exparte interim relief, which was continued from time to time during the pendency of the suit and because of the undertaking he furnished not to withdraw this amount before this Court. The trial Court has granted the exparte interim relief in terms of para-9(b) of the application for grant of temporary injunction, which is already reproduced in the judgment. This interim relief has been granted by the trial Court on 6th July 1998 which was continued till the trial Court vacated the same on 11th August 1998. Thereafter, during the pendency of this Appeal, the defendant-respondent No.1 has given out voluntarily, an undertaking not to withdraw this amount. He suffered the loss of about Rs.10,000/= per day what the learned counsel for the defendant-respondent No.1 submitted, which is a heavy amount. The learned counsel for the plaintiff-appellant during the course of argument has, as stated earlier, accepted that the loss may be of about Rs.6,000/= per day to the defendant-respondent No.1. The learned counsel for the defendant-respondent No.1 alternatively contended that this Court may direct the plaintiff-appellant to furnish solvent surety for this amount of loss which has already been suffered by the defendant-respondent No.1. It is true that because of the exparte interim relief granted by the trial Court which was continued till the matter was finally decided, the defendant-respondent No.1 has suffered a loss, to be precise, daily loss. The amount of Rs.1,21,00,000/= and odd is lying deposited in the current account and the Bank may not give any interest thereon. The defendant-respondent No.1 is a businessman and there is all possibility of borrowing of the money from the market for the purpose of his own business and normally the money in the market may not be available at the rate of interest less than 18 to 24% p.a. It is also case of the defendant-respondent No.1 before this Court that heavy balance amount has to be paid by him to the processor towards the charges of processing of software floppies which have been exported by him to the importer and there may be a liability of

the interest accruing thereon also. Leaving apart all these considerations it can be accepted that the defendant-respondent No.1, being a businessman, would have made use of this heavy amount in his business or he may have used this heavy amount for discharging his liabilities which may be the liability incurring thereon with regular interest also. However, I do not consider it to be appropriate at this stage to give any directions to meet out these grievances of the defendant-respondent No.1. It is open to the defendant-respondent No.1 to make appropriate application before the trial Court for these grievances and the learned trial Court shall decide the same in accordance with law.

##. The net result of the aforesaid discussion is that this Appeal fails and the same is dismissed. As the defendant-respondent No.1 has put appearance on his own by filing a Caveat, no order as to costs.

.....

(csm/sunil)